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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO BARAJAS, Defendant and Appellant.	2d Crim. No. B266151 (Super. Ct. No. GA074425) (Los Angeles County)

Roberto Barajas appeals the judgment entered after a jury convicted him of first degree murder (Pen. Code,[1] §§ 187, subd. (a), 189). The jury also found true allegations that appellant committed the murder for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that a principal personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The trial court sentenced him to a total term of 50

[1]All statutory references are to the Penal Code unless otherwise stated.

years to life in state prison. Appellant raises claims of evidentiary, instructional, constitutional, cumulative, and sentencing error. He also contends, and the People agree, that the matter should be remanded for the trial court to consider whether to strike appellant's firearm enhancement in light of Senate Bill 620, which went into effect while the appeal was pending. We shall order the matter remanded on that point. Otherwise, we affirm.[2]

STATEMENT OF FACTS

In 2007 or early 2008, victim Jennifer Ortega became romantically involved with Jaime Flores, a former member of the Villa Boys gang in Pasadena. Flores left the gang after he was sentenced to prison in 2006. Following his release from prison, he met Ortega and they began spending time together, having sex, and using drugs.

On April 16, 2008,[3] Ortega and Rudy Martinez, a Pacoima gang member who was on parole, were arrested for possessing methamphetamine. Ortega initially acknowledged that the drugs she had been seen discarding were hers, but later told the police the drugs belonged to Martinez.

On August 7, Villa Boys member Eddie Solario sent a letter from prison to Debbie Garcia, an associate of the gang. The letter stated that a fellow prisoner had "paperwork" indicating that Ortega had blamed him for drugs found in her possession. Solario told Garcia that Ortega "knows you're not supposed to talk to cops. Now she has to live with that for the rest of her life.

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[2] Appellant also challenges his conviction in a petition for writ of habeas corpus, which we deny in a separate order.

[3] All unspecified date references are to the year 2008.

Don't forget to tell all them youngsters that. That way they don't make that mistake." In a letter dated August 17 that was never sent, Garcia told Solario that "everyone in Pasa[dena] is looking for [Ortega] literally cuz she's fucking up and burning people."

Appellant was also a member of the Villa Boys gang. After Flores left the gang, appellant began leaving him threatening voicemail messages. In one message, appellant told Flores, "We're going to get you guys."

A few days prior to Ortega's murder, she and Flores saw appellant at an apartment building frequented by members of the Villa Boys. Appellant called Ortega and Flores "snitches" and told them "we're going to get you." Ortega and Flores "got scared" and left. Flores told Ortega to stay home with her family and avoid neighborhoods occupied by the Villa Boys.

At 2:00 a.m. on August 19—approximately 20 hours before the murder—S.K. was in a building in Pomona when she saw appellant holding a silver semiautomatic handgun. S.K. watched appellant as he removed a magazine from the gun and reloaded it. She subsequently saw him leave in a PT Cruiser.

At about 9:45 p.m. that night, Aaron Gomez saw a black PT Cruiser enter the parking lot of a closed store in Pasadena. A short time later, Gomez heard two or three gunshots, then saw the PT Cruiser and a red car drive away. As the PT Cruiser was leaving, the front passenger door was opened. Guillermina Alvarez also heard the gunshots and saw a dark PT Cruiser speed away with its headlights off, followed by a red car.

Shortly after both cars left, Gomez and Alvarez heard a woman screaming and saw her crawling out of the parking lot toward the sidewalk. Alvarez called 911 on behalf of the woman, who was subsequently identified as Ortega. She had been shot

three times in the back. She was taken by ambulance to the hospital, where she died of her injuries.

The police recovered three expended casings from the scene of the shooting. Testing confirmed that the casings were all fired from the same 9-millimeter semiautomatic handgun. The casings were placed onto a gauze pad in a clean and sterile scent transfer unit (STU) for possible dog trailing. The pad was subsequently placed in a heat-sealed bag for possible future use.

The police also obtained surveillance video from a gas station located at the intersection where the shooting occurred. The video shows the driver of a black PT Cruiser make a U-turn, turn off the car's headlights, and back into the parking lot where Ortega was shot less than two minutes later. After the shots were fired, the PT Cruiser is seen speeding away with the front passenger door slightly open. Shortly thereafter, another car is seen leaving the parking lot with its headlights off.

On August 28, Pasadena Police Detective William Broghamer, the lead detective assigned to the case, saw a black PT Cruiser in the parking lot of a motel in Pasadena. Detective Broghamer obtained the PT Cruiser's license plate number and determined that the vehicle belonged to appellant. While the detective was in the motel's office, he saw appellant, Villa Boys associate Maria Herrera, and three other females get into the PT Cruiser. As appellant was about to drive away, Detective Broghamer stopped the vehicle and detained its occupants. Appellant was arrested and transported to the police station.

That same night, the police searched appellant's bedroom and found a computer that had been used to access a news article about Ortega's murder. The computer had also recently been

used to visit the website for Kelly Blue Book, which provides estimates regarding the resale value of used vehicles.

On September 1, a dog scent test was conducted at the Pasadena police station using a hound named Bojangles and his handler, Edward Hamm. To conduct the test, Detective Grant Curry asked Detective Vidales to take appellant from the basement jail and up the stairwell to any location on the third floor, which measures 7,000 square feet. After Detective Vidales did not answer a call to determine if he was ready, Detective Curry went up to the third floor and found him with appellant in the break room located next to the stairwell.

Detective Curry told Detective Vidales to find a more difficult location, then returned to the base of the stairwell to meet with Hamm and Bojangles. After smelling the gauze pad used to collect any scent on the casings recovered from the scene of the shooting, Bojangles started walking up the stairwell on a 10 to 15-foot leash held by Hamm. Once he reached the third-floor landing, Bojangles had three possible paths to take. He went through the break room and into a hallway. The dog initially went to the left, but then turned around and went in the opposite direction. He then passed another hallway and about five doors before turning left down a different hallway. Bojangles continued to the end of the hallway, where appellant and Detective Vidales were standing. After briefly smelling the detective, Bojangles went to appellant and alerted to him by keeping his nose at appellant's knee until Hamm used the leash to pull him away.

The following day, Richshawna Whitten, a Villa Boys associate, was interviewed at the Pasadena Police station by Detective Broghamer and Detectives Andrea Perez and Keith

Gomez. After waiving her *Miranda*[4] rights during the recorded interview, Whitten said she had heard prior to Ortega's murder that she had been "snitch[ing]." When asked if she knew who drove a black PT Cruiser, she identified appellant.

Whitten initially denied being present when the shooting occurred but said she had heard that appellant and another Villa Boys member she knew only as "Mono"[5] had committed the crime. Whitten eventually admitted she was present when Ortega was killed. She arrived at the scene in a red car along with Garcia, Herrera, and another female known as "Charms." Garcia and Herrera had arranged for Ortega to meet them there. Whitten was told that Garcia and Herrera were planning to give Ortega a "beat down" as punishment for being a snitch; nothing was said about shooting her.

Garcia and Herrera walked up to Ortega, grabbed her, and accused her of being a snitch. Garcia and Herrera let go of Ortega as appellant drove up in his PT Cruiser. Mono exited the front passenger seat and repeatedly shot Ortega. Mono then got back into the PT Cruiser and appellant drove away.

Whitten testified at trial under a grant of immunity. She claimed she could not recall her prior statements and testimony[6] and denied being present when Ortega was murdered. She also

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

[5] Appellant's opening brief identifies Mono as Guillermo Marquez, but no supporting record citation is offered.

[6] Whitten had also testified at the preliminary hearing and at appellant's first trial, which resulted in a mistrial after the jury was unable to reach a verdict.

claimed that her prior statements and testimony were coerced by Detective Broghamer. According to Whitten, she agreed to say whatever the detective wanted her to say after he "threatened to do something about [her] kids' whereabouts."

Lisette Reyes, another Villa Boys associate, was interviewed by the police later the same day as Whitten's interview. Prior to Ortega's murder, Reyes had seen appellant and two or three other young males physically assault Mono as punishment for bringing Ortega into the gang. The day after the murder, appellant and Mono came to her house. Both men were acting paranoid and appellant was holding a gray semiautomatic handgun. They bragged about the gun, said they had to get rid of it because it was "hot," and asked Reyes to give them a screwdriver so they could take the gun apart.

In 2012, Reyes was stopped for a traffic violation. During the stop, she told the officer that she had previously provided the police with information regarding Ortega's murder. She identified appellant as the getaway driver and added that after the murder, he brought a semiautomatic handgun to her house and disassembled it.

At trial, Reyes recanted her prior statements. During her interview at the police station, she was under the influence of methamphetamine. She also feared she would be arrested and prosecuted for the murder, so she told the detectives what they wanted to hear. She denied making the statements attributed to her by the officer who conducted the traffic stop.

Detective Perez testified as the prosecution's gang expert. The Villa Boys gang is a criminal street gang with approximately 100 documented members and six subsets, including the Krazy Boys. The gang's primary activities include robberies, shootings,

drug sales, and car theft. Detective Perez opined that appellant was a member of the Villa Boys. She reached that opinion based on photographs of appellant's tattoos and her review of departmental resources.

When presented with a hypothetical tracking the facts of the case, Detective Perez opined that Ortega was killed at the direction of the Villa Boys, in association with other members of the gang, and for the benefit of the gang. The detective opined that the crime benefitted the gang by instilling fear in the community and by sending the message that the gang was "not afraid to clean their own messes."

DISCUSSION

I.

S.K.'s Testimony; Limiting Instruction

Appellant contends the trial court erred in admitting S.K.'s testimony that she saw appellant unload and reload a silver semiautomatic firearm approximately 20 hours prior to Ortega's murder. He further contends the court erred in instructing the jury regarding the limited relevance of the evidence. Neither contention has merit.

In 2009, appellant was sentenced to 15 years in prison for an armed robbery he committed at a convenience store approximately 20 hours prior to Ortega's murder. Prior to trial, the prosecutor stated that he intended to call S.K., the victim of the robbery, to testify she had seen appellant load and reload a magazine into a chrome-colored semiautomatic handgun. The prosecutor offered the evidence "as corroboration as to . . . the gun described by []Whitten and []Reyes. And it is alleged by this witness . . . that [appellant] had removed the clip from the gun and put it back in and handled the magazine of the gun. That

would tend to corroborate the dog scent evidence as well, given the fact that the fingers were in closer proximity to the bullets." The prosecutor added that he also intended to elicit S.K.'s testimony that she had seen appellant drive away in a PT Cruiser. The prosecutor made clear he did not intend "to go into the robbery" and conceded "[t]he fact that [appellant] ran out of the store is way too prejudicial."

Appellant objected to the proposed testimony as inadmissible evidence of his bad character that did not fall under any of the exceptions set forth in Evidence Code section 1101, subdivision (b). He argued "I think a better policy, because it is so bad under [Evidence Code section] 352 – the jury is going to figure out immediately that he's up to no good. It's back-door character evidence any way the court wants to classify that."

The court asked, "How is having a gun and leaving in a PT Cruiser character evidence? It isn't. . . . It is circumstantial evidence of identity." The court later added: "[M]aybe I'm confusing the matter by talking about identity. But it seems to me that the evidence linking [appellant] with a similar gun and driving a similar car isn't evidence of his character, but rather evidence that suggests he was at the scene of the murder." The prosecutor agreed with the court's analysis and reiterated that "[w]e're going to sanitize the entire robbery."

The court overruled appellant's objection and allowed S.K. to testify. To further sanitize the robbery, the court ordered the prosecutor to refrain from eliciting testimony that S.K.'s observations of appellant took place in a convenience store.

Before S.K. was called to testify, the prosecutor told the court "she'll I.D. [appellant] and whether or not it was through a six-pack." S.K. went on to testify that shortly after 2:00 a.m. on

August 19, 2008, she entered a building in Pomona and saw a man holding a bag of trail mix and a silver semiautomatic handgun. S.K. saw the man remove the magazine from the gun and reload it, then saw him leave in a PT Cruiser. S.K. tentatively identified appellant as the man she had seen, but was unsure given the passage of time. The prosecutor then elicited evidence that S.K. had previously identified appellant in a photographic lineup on September 11, 2008.

At the conclusion of the trial, appellant submitted a proposed jury instruction regarding S.K.'s testimony.[7] After reviewing appellant's proposed instruction, the court drafted an instruction stating: "Evidence of the defendant's possession of a firearm prior to the alleged crime may only be considered as circumstantial evidence that he was in possession of the firearm at or near the time or place of the alleged crime. You are not to speculate as to the circumstances surrounding this evidence or consider this evidence for any other purpose."

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[7] The proposed instruction stated: "You are instructed that any evidence before you in this case regarding the defendant's possession of a firearm at a different time than the time of the alleged crime for which he is on trial may only be considered as circumstantial evidence that he possessed a firearm, and for no other purpose. You are not to speculate about the circumstances surrounding this evidence. You may not use this testimony as evidence of [appellant's] bad character or to suggest that he was more likely to have committed this offense due to having previously possessed a firearm. Furthermore, there is no evidence that [he] has ever been convicted of a crime, and there is no evidence that [he] has ever been arrested for a crime other than the one for which he is currently on trial."

When presented with the court's instruction, defense counsel replied, "That's fine." The jury was instructed accordingly.

Appellant contends the court abused its discretion and violated his constitutional rights to due process and a fair trial by admitting S.K.'s testimony. He claims "[t]he court and the parties agreed that this evidence was offered on the issue of identity" and argues that "[i]n admitting this evidence on identity, the court did not apply the California Supreme Court's bright-line test restricting its admission under Evidence Code section 1101, subdivision (b)." According to appellant, to be admissible on this theory "[t]he uncharged offense and charged crime must share common features that are so distinctive to support an inference that the same person committed them. They must be 'signature' crimes." (Citation omitted.)

But the court and parties did not agree that the evidence was offered to prove identity, at least not in the manner contemplated in subdivision (b) of Evidence Code section 1101. That statute governs the admissibility of evidence of uncharged "bad" acts. (See *People v. Jefferson* (2015) 238 Cal.App.4th 494, 504.) Although S.K.'s testimony related to a robbery that appellant committed shortly before Ortega's murder, the evidence was sanitized to eliminate any reference to that crime.[8]

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[8] Appellant also claims the prosecutor "violated the spirit, if not the letter, of the court's expressed concern to sanitize" S.K.'s testimony by presenting evidence she had previously identified him in a six-pack photographic lineup. He contends this evidence "informed jurors that [he] had a criminal character" because it "documented that [he] had committed a criminal act." Appellant did not object when the evidence was offered so his claim is forfeited. In any event, the evidence was properly admitted as a

Moreover, the court instructed the jury that the evidence "may only be considered as circumstantial evidence that [appellant] was in possession of the firearm at or near the time . . . of the alleged crime." The jury was also instructed "not to speculate as to the circumstances surrounding this evidence or consider this evidence for any other purpose." We presume the jury understood and followed these instructions. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 205-206.)

We also reject appellant's claim that the court erred in declining to exclude S.K.'s testimony under Evidence Code section 352. That section grants trial courts the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice." (Evid. Code, § 352.) S.K.'s testimony bolstered the dog trailing evidence as well as Reyes's testimony that appellant brought a semiautomatic firearm to her house the day after Ortega's murder. Moreover, the potential danger of undue prejudice was minimized by the court's limiting instruction. Accordingly, the court did not abuse its discretion or deprive appellant of his due process rights by allowing S.K. to testify. (*People v. Farnam* (2002) 28 Cal.4th 107, 156.)

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prior extrajudicial identification. (Evid. Code, § 1238; *People v. Dykes* (2009) 46 Cal.4th 731, 757-758.) Moreover, it would have been clear to the jury that S.K. identified appellant from a photographic lineup *after* he was arrested for Ortega's murder. The jury was also instructed not to speculate regarding the circumstances in which S.K. had seen appellant in possession of the firearm. Accordingly, no reasonable juror would have inferred from the photographic lineup that appellant had been identified as a suspect in another criminal case.

Appellant's claim of instructional error also fails. His complaint regarding the instruction is premised on the erroneous assertion that S.K.'s testimony constituted character evidence under Evidence Code section 1101. As we have noted, the court's instruction also made clear that the evidence "may only be considered as circumstantial evidence that he was in possession of the firearm at or near the time of the alleged crime," and that the jury was "not to speculate as to the circumstances surrounding this evidence or consider this evidence for any other purpose." Nothing in the record defeats the presumption that the jury understood and followed these instructions. (*People v. Gonzalez*, *supra*, 5 Cal.5th at pp. 205-206.)

In any event, any error in admitting S.K.'s testimony or instructing the jury on the limited relevance of that evidence would not compel reversal of appellant's conviction. In arguing to the contrary, appellant offers that his first trial (in which S.K.'s testimony was not presented) ended in a mistrial, and that the jury on retrial asked for a readback of S.K.'s testimony and spent over 18 hours in deliberations.

Although such factors can support a finding of prejudice (see *Fry v. Pliler* (2007) 551 U.S. 112, 125, fn. 4 [168 L.Ed.2d 16, 23, fn.4]), they do not compel such a finding here. Among other things, an eyewitness to the murder identified appellant as the getaway driver and dog trailing evidence connected him to both the murder weapon and the crime. There was also evidence that appellant had made threats against Ortega and was seeking to dismantle a "hot" semiautomatic firearm the day after the murder. Given the ample independent evidence of appellant's guilt, any error in admitting the challenged evidence or instructing the jury thereon was harmless regardless of the

standard of review. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*) [constitutional errors are reversible unless they are harmless beyond a reasonable doubt; *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) [ordinary evidentiary errors are harmless unless, absent the error, it is reasonably probable the defendant would have achieved a more favorable result].)

II.

Detective Broghamer's Interview of Garcia

Appellant next contends the trial court erred in precluding him from playing a recording of Detective Broghamer's interview of Garcia. We disagree.

During his testimony, Detective Broghamer admitted telling a suspect in another criminal case "I might lie to fry your ass." Appellant also sought to cross-examine the detective with his recorded interview of Garcia, in which he told her she could be charged with the death penalty and that he would report her mother and brother to the INS. Appellant asserted that the recording was admissible to prove the detective's "pattern is to lie when he does interrogations and that he lied about . . . never threatening" Whitten's relationship with her children. The prosecutor countered that the evidence should be excluded under Evidence Code section 352 because Garcia had not testified as a witness and the prosecution had not offered any statements made by her.

The trial court ruled that the recording would only be admissible if Detective Broghamer denied making the alleged threatening statements against Garcia; otherwise, the evidence would be excluded as cumulative under Evidence Code section

352. The detective went on to acknowledge what he had said to Garcia, so the evidence of the recording was not admitted.

Appellant contends the court's ruling was an abuse of discretion and violated his federal constitutional rights to confront the witness against him and present a defense. He acknowledges that his constitutional claims are forfeited because they were not raised below, but contends that counsel's failure to preserve the claims amounts to ineffective assistance of counsel.

Appellant fails to establish a claim of ineffective assistance, which requires a showing of both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [80 L.Ed.2d 674, 693-699] (*Strickland).*) Appellant makes no showing of prejudice, i.e., a reasonable probability that he would have achieved a more favorable result if counsel had preserved his constitutional claims. (*Ibid.*)

"Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20 [88 L.Ed.2d 15, 19], italics omitted.) Trial judges retain broad discretion to impose reasonable limits on cross-examination. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citations.]" (*Id.* at pp. 623-624.)

Appellant makes no such showing here. The challenged evidence was excluded under Evidence Code section 352. As a

general matter, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's constitutional right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1122; *People v. Boyette* (2002) 29 Cal.4th 381, 414.) Appellants "must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the [trier of fact] may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the [trier of fact] must have used the evidence for an improper purpose.' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.)

Accordingly, we review the trial court's ruling for an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 597.) Whenever "a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316, italics omitted.) "'The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.)

Appellant fails to meet his burden of showing that the court abused its discretion in excluding the recording of Detective

Broghamer's interview of Garcia. The evidence was plainly cumulative because it was offered to prove what the detective had already admitted, i.e., that he told Garcia she could face the death penalty and that he would report her family to the INS. The court had broad discretion to exclude the evidence on this ground. (*People v. Pride* (1992) 3 Cal.4th 195, 235.) Moreover, the record does not demonstrate that the court's ruling was arbitrary, capricious, or patently absurd such that it resulted in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Given the ample independent evidence of appellant's guilt, any error in admitting the evidence was also harmless under any standard of review.

III.

Dog-Scent Evidence

Appellant contends the court violated his constitutional rights to due process and a fair trial by admitting the dog-scent evidence. He argues that the evidence should have been excluded as unreliable and that "the trial court's restriction on the defense cross-examination of the handler to show that unreliability also violated [a]ppellant's right to confrontation."

Appellant's constitutional claims were not raised below and are thus forfeited. In any event, our Supreme Court has recognized that trial courts exercise broad discretion in issuing foundational rulings regarding the admissibility of dog scent evidence. (*People v. Jackson* (2016) 1 Cal.5th 269, 320-321 (*Jackson*).) Such evidence is admissible upon a foundational showing that (1) the dog's handler was qualified by experience and training to handle the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; and (4) the dog was "'placed on the

track where circumstances indicated the guilty party to have been.'" (*Id.* at pp. 321, 322-326.)

Appellant did not raise a foundational objection below. Instead, he contended that the dog-scent evidence was derived from a "new scientific technique" as contemplated in *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). Pursuant to *Kelly*, evidence derived from a new scientific technique is inadmissible "unless the proponent shows that (1) 'the technique is generally accepted as reliable in the relevant scientific community'; (2) 'the witness testifying about the technique and its application is a properly qualified expert on the subject'; and (3) 'the person performing the test in the particular case used correct scientific procedures.' [Citation.]" (*Jackson*, *supra*, 1 Cal.5th at pp. 315-316.)

The trial court held several *Kelly* hearings regarding the dog-scent evidence and ultimately found the evidence admissible. Our Supreme Court has since recognized that dog-scent evidence "falls outside the scope of *Kelly* because it is not mechanized but rather the product of individual skill and innate physical ability." (*Jackson*, *supra*, 1 Cal.5th at pp. 315-316.) The court reasoned that "[j]urors are capable of understanding and evaluating testimony about a particular dog's sensory perceptions, its training, its reliability, the experience and technique of its handler, and its performance in scent trailing." (*Id.* at p. 317.)

Appellant expressly declines to challenge any of the court's rulings on the admissibility of the evidence raised at the *Kelly* hearings. Moreover, his arguments regarding the reliability of the dog-scent evidence focus exclusively on the testimony and evidence presented at trial. Because he did not make a foundational objection under Evidence Code section 402, he

cannot now be heard to complain that the foundational requirements set forth in *Jackson* were not met.

In any event, appellant's claim lacks merit. In contending that the dog-scent evidence should have been excluded, he offers among other things that (1) Hamm testified that he kept training records for Bojangles but had lost most of them during a computer crash; (2) Bojangles's identification of appellant at the police station was "significantly different from the historical use of dogs to track a suspect from a crime scene or to locate a missing person"; and (3) "the path that the dog team followed went through a number of open doors and ended in an open hallway when [a]ppellant was readily visible." He also refers to the extensive trial testimony given by his own experts challenging the dog-scent evidence. But all of the experts' testimony, in addition to the other evidence cited by appellant, went to the weight of the dog-scent evidence rather than its admissibility. (*Jackson*, *supra,* 1 Cal.5th at pp. 325-326.)

Appellant also complains that "[t]he prosecution presented no expert testimony concerning any scientific experiments published in peer-reviewed scientific journals proving that scent on a cartridge case survived the firing of its projectile." But no such evidence was necessary. In *Jackson*, the court recognized that "[i]f a well-qualified handler trains a dog who has reliably trailed human scent and is well trained in ignoring or forgetting past smells and in indicating negative trails, then the dog will not trail if the scent on the scent item is stale or nonexistent, or if there is no trail that matches the scent on the scent item. The dog will also be able to distinguish among scents even if there are multiple scents (so-called contamination) either on the scent item or in the trail itself." (*Jackson*, *supra*, 1 Cal.5th at p. 325.)

Accordingly, establishing that the source of a scent contains a detectable amount of the scent is not a separate prerequisite to admissibility. (*Ibid.*) Moreover, appellant's own experts vigorously contested the prosecution expert's opinion that human scent can be obtained from expended bullet casings. "This disagreement among the experts was for 'the jury to resolve . . . , accepting such of it, or none of it, as they saw fit.' [Citation.]" (*Id.* at p. 326.)

Appellant's claim that the court erred in limiting his cross-examination of Hamm also lacks merit. Appellant sought to question Hamm regarding a prior case in which another dog he previously handled (Knight) allegedly misidentified a suspect. According to appellant's offer of proof, Knight picked up a scent from a cigarette lighter that was found at the scene of an arson. Knight, while being handled by Hamm, trailed the scent to the outside of a house. Hamm and Knight "couldn't go into the house" because "[t]he FBI . . . didn't want [the suspect] to be tipped off." The man who lived in the house was arrested, but he was subsequently released after the actual perpetrator confessed.

Defense counsel asserted that this evidence was relevant to impeach Hamm because "[h]e says he's never had a false I.D. . . . as a dog handler." The prosecutor disputed that Hamm had ever said this. Defense counsel further asserted that the evidence "shows as a handler, he can make a mistake."

In excluding the evidence, the trial court reasoned that (1) Knight was not the dog involved in appellant's case; (2) Knight had identified a house rather than a person; and (3) the actual perpetrator (whose scent Knight was purportedly following) may have passed by the house after he started the fires. The court indicated it would revisit its ruling if appellant could establish

that the actual perpetrator of the crime had never been in or near the house to which Knight had trailed.

The court did not err. Appellant's offer of proof was insufficient to establish that Knight had misidentified a suspect. Moreover, the relevance of dog-scent evidence focuses on the ability and reliability of a particular dog. (*Jackson*, *supra*, 1 Cal.5th at p. 317.) Even if the proffered evidence had some relevance to the evaluation of Hamm's experience and training techniques, the court did not abuse its discretion in excluding it. As the People persuasively note, if the evidence had been admitted "the prosecution may well have countered with all of the successful identifications made by Knight and the other dogs Hamm had trained over the years. Thus, the proffered cross-examination would have consumed an undue amount of time on a collateral issue and posed a strong danger of confusing the jury by focusing their attention on a dog that had no involvement in the instant case."

In any event, any error in admitting the dog-scent evidence or limiting appellant's cross-examination of Hamm was harmless. The erroneous admission of dog-scent evidence is reviewed for prejudice under the *Watson* standard. (*People v. Mitchell* (2003) 110 Cal.App.4th 772, 795.) Accordingly, such error does not compel reversal unless it is reasonably probable the defendant would have been acquitted had the evidence been excluded. (*Ibid.*)

Appellant cannot make that showing here. Although the dog-scent evidence was incriminating, there was ample independent evidence of appellant's guilt. Moreover, appellant presented his own dog-scent identification experts who countered virtually every aspect of the prosecution's dog-scent evidence.

Appellant was also allowed to cross-examine Hamm with video evidence of another incident in which Bojangles was unable to identify a suspect under similar circumstances. After viewing the video, Hamm also admitted it depicted him "cuing" Bojangles by tugging at his leash, a tactic that was strongly criticized by the defense experts.

Appellant asserts that the alleged prejudice in admitting the dog-scent evidence was "heightened" by the jury instruction regarding that evidence. Without any objection from defense counsel, the jury was instructed pursuant to CALCRIM No. 374 as follows: "You have received evidence about the use of a tracking dog. You may not conclude that the defendant is the person who committed the crime based only on the fact that a dog indicated the defendant. Before you may rely on dog tracking evidence, there must be: [¶] 1. Evidence of the dog's general reliability as a tracker; [¶] AND [¶] 2. Other evidence that the dog accurately followed a trail that led to the person who committed the crime. This other evidence does not need to independently link the defendant to the crime. [¶] In deciding the meaning and importance of the dog tracking evidence, consider the training, skill, and experience, if any, of the dog, its trainer, and its handler, together with everything else that you learned about the dog's work in this case."

Appellant contends the instruction does not apply to the specific facts of this case. He argues that "th[e] instruction may be adequate where a suspect has been tracked directly from a crime scene, it is wholly inadequate" where, as here, a dog identifies a suspect at a police station.

Although CALCRIM No. 374 might seem more appropriate in cases in which a dog has trailed a suspect directly from a crime

scene (see, e.g., *People v. Gonzales* (1990) 218 Cal.App.3d 403, 406-407), it is not inapplicable to police station identifications. The instruction simply states there must be other evidence that the dog accurately followed a trail that led to the person who committed the crime. "[T]he corroborating evidence necessary to support dog-tracking evidence need not be evidence which independently links the defendant to the crime; it suffices if the evidence merely supports the accuracy of the dog tracking." (*Id.* p. 408.) Appellant's claim that the jury may have misinterpreted the instruction in a manner that prejudiced him is unavailing.

Because the dog-scent evidence was vigorously contested at trial, and given the ample independent evidence of appellant's guilt, it is not reasonably probable he would have achieved a more favorable result had the evidence been excluded. Any error in admitting the dog-scent evidence or in limiting appellant's cross-examination of Hamm was thus harmless. (*People v. Mitchell*, *supra*, 110 Cal.App.4th at p. 795; *Watson*, *supra*, 46 Cal.2d at p. 836.)

IV.
Sanchez

Appellant asserts that the trial court prejudicially erred in allowing Detective Perez, the prosecution's gang expert, to testify to case-specific testimonial hearsay. He argues that the evidence was admitted in violation of state hearsay rules and his constitutional confrontation rights, as provided in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which was decided a year after he was tried and convicted. Although appellant did not object at trial, he contends an objection would have been futile. The People respond that the claim is forfeited and in any event lacks merit.

We conclude the claim is not forfeited. "Any objections would . . . have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause. [Citation.] We will therefore address the merits of this claim." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 (*Meraz*); see also *People v. Stamps* (2016) 3 Cal.App.5th 988, 995 [recognizing that *Sanchez* announced a "paradigm shift" in the law regarding the admissibility of expert testimony].)

On the merits, however, the claim fails. In *Sanchez*, our Supreme Court held that a gang expert witness cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) Thus, an expert "is generally not permitted . . . to supply case-specific facts about which he has no personal knowledge." (*Id.* at p. 676.) The court defined "case-specific facts" as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*)

Sanchez also held that the trier of fact must necessarily consider the basis for expert testimony for its truth in order to evaluate the expert's opinion, which in turn implicates the Sixth amendment right of confrontation. (*Sanchez*, *supra*, 63 Cal.4th at p. 684.) The admission of a testimonial hearsay statement by a declarant who is not available at trial violates the confrontation clause of the Sixth Amendment unless the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 62, 68 [158 L.Ed.2d. 177, 199, 203] (*Crawford*).) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those

statements as true and accurate to support the expert's opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, at p. 686, fn. omitted.)

In his opening brief, appellant purports to identify multiple instances in which Detective Perez testified to inadmissible hearsay in violation of *Sanchez*. He goes on to claim the error is prejudicial because "[w]ithout the gang expert's hearsay testimony now excluded by *Sanchez*, the prosecution did not prove that Villa Boys gang members engaged in a pattern of criminal . . . activity," as provided in section 186.22, subdivision (e).[9] He claims the error also compels reversal of his murder conviction because the prosecutor "emphasized [the gang evidence] during both opening statement and closing arguments."

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[9] "The gang enhancement applies to one who commits a felony 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (Pen. Code, § 186.22, subd. (b)(1).) 'In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' [Citations.]" (*Sanchez*, *supra*, 63 Cal.4th at p. 698.)

Appellant misconstrues *Sanchez*. "Under *Sanchez*, facts are only case specific when they relate 'to the particular events and participants alleged to have been involved in the case being tried[.]' . . . [Citation.] The court made clear that an expert may still rely on general 'background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory,' which is relevant to the 'gang's history and general operations.' [Citation.] This plainly includes . . . general background testimony . . . about [a gang's] operations, primary activities, and pattern of criminal activities . . . . Thus, under state law after *Sanchez*, [a gang expert is] permitted to testify to non-case-specific general background information about [a gang], . . . its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers." (*Meraz*, *supra*, 6 Cal.App.5th at p. 1175, fn. omitted, italics omitted.)

Even if Detective Perez's testimony about the predicate offenses offered to prove the requisite pattern of criminal activity was "case-specific" under *Sanchez*, the detective did not actually convey any inadmissible hearsay in her testimony on that subject. As proof of the two predicate offenses, the prosecution offered certified court records of Solario's 2007 conviction for possessing a controlled substance for sale, and Juan Vasquez's 2005 conviction of robbery. Certified court records are admissible as an exception to the hearsay rule. (Evid. Code, §§ 1270, 1271, 1280.) Moreover, certified records of conviction are sufficient to establish the predicate gang offenses. (*People v. Gardeley* (1996) 14 Cal.4th 605, 624, disapproved on other grounds in *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)

Based on her personal contacts with both men and her "review of departmental resources," Detective Perez also opined that they were both members of the Villa Boys gang. This testimony did not run afoul of *Sanchez*. "Any expert may still rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so." (*Sanchez*, *supra*, 63 Cal.4th at p. 685, italics omitted.) Because Detective Perez's opinions that Solario and Vasquez were members of the Villa Boys did not relate to the jury any out-of-court statements offered for the truth of the matter asserted, her testimony on that issue did not violate *Sanchez*. (*Ibid.*)

In any event, any *Sanchez* error would be harmless. Detective Perez's opinions that Solario and Vasquez were members of the Villa Boys gang were based in part on her personal knowledge of facts obtained through her prior contacts with both men. Moreover, there was strong independent evidence that appellant was also a member of the gang, that he was an accomplice to Ortega's murder, and that the crime was committed in association with other members of the gang with the specific intent to further the gang's activities. As defense counsel acknowledged in his closing argument, appellant admitted he was a member of the Villa Boys and had "bragg[ed] about his stupid gang." Any *Sanchez* error was thus harmless regardless of the standard of review. (*Chapman*, *supra*, 386 U.S. at p. 24 [17 L.Ed.2d at pp. 710-711]; *Watson*, *supra*, 46 Cal.2d at p. 836.)

V.

Cumulative Error

Appellant asserts that the cumulative effect of the alleged errors deprived him of a fair trial. We have either rejected

appellant's claims or found that any errors, presumed or not, were not prejudicial. Viewed cumulatively, we conclude that any errors do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

VI.

Concurrent/Consecutive Term

At the time of sentencing, appellant was serving a 15-year prison term for his 2009 robbery conviction. In sentencing appellant in the instant matter, the trial court did not specify whether the new term was to run concurrent or consecutive to his prior sentence for the robbery.

As appellant correctly notes, the new term thus runs concurrent to the prior term by operation of law. (§ 669, subd. (b) ["Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently"]; *In re Reeves* (2005) 35 Cal.4th 765, 769; *People v. Bruner* (1995) 9 Cal.4th 1178, 1181-1182.) He requests that we order the judgment be so modified. We decline the request. Because appellant's term runs concurrent to his prior term by operation of law, the requested modification is unnecessary.

VII.

Senate Bill 620

Appellant contends his case must be remanded in light of Senate Bill 620, which amends section 12022.53 to afford a trial court discretion to strike a firearm enhancement in the interest of justice. The People agree.

Prior to January 1, 2018, an enhancement under section 12022.53 was mandatory and could not be stricken in the

interests of justice. (See former § 12022.53, subd. (h) (Stats. 2010, ch. 711, § 5); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.) Senate Bill 620 amended section 12022.53, subdivision (h) to permit the trial court to strike firearm enhancements imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

Senate Bill 620 applies retroactively to appellant because it went into effect before his judgment became final. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712; see also *In re Estrada* (1965) 63 Cal.2d 740, 744.) Moreover, the record does not clearly indicate the trial court would have declined to strike appellant's firearm enhancement had it known it had the discretion to do so. "Absent such a clear indication, the appropriate remedy is to remand for resentencing to allow the trial court to consider whether to exercise its discretion to strike or dismiss the section 12022.53, subdivision (h) enhancement under section 1385. [Citation.]" (*Chavez*, at p. 714.) We shall remand the matter accordingly.

DISPOSITION

The matter is remanded for the trial court to consider whether to exercise its discretion to strike appellant's firearm enhancement as provided in section 12022.53, subdivision (h). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Suzette Clover, Judge
Superior Court County of Los Angeles

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